GAI HIN REFRIGERATION SDN BHD

v.

KAMANIS HOLDINGS SDN BHD

COURT OF APPEAL, PUTRAJAYA
ARIFIN ZAKARIA JCA
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: N-02-641-1997]
16 AUGUST 2004

CIVIL PROCEDURE: *Judgment - Consent judgment - Variation by judge - Whether proper - Application by defendant to set aside consent judgment dismissed by judge - Whether judge can thereafter vary consent judgment - Whether judge had become functus officio - Whether judge still had jurisdiction to vary consent judgment - Whether consent judgment already drawn up and perfected - Binding nature of consent judgments*

This was an appeal by the plaintiff from the decision of the learned judge varying the consent judgment entered into earlier as between the plaintiff and the defendant. It was the plaintiff's contention that, having dismissed the defendant's application to set aside the consent judgment, the learned judge should not have proceeded thereafter to vary the consent judgment. This, it was argued, was because the learned judge had become *functus officio* and would, therefore, have no jurisdiction to vary the consent judgment. Conversely, the defendant submitted that the learned judge would still retain his discretion to amend the consent judgment as long as it had not been perfected.

Held (allowing the plaintiff's appeal)
Per Nik Hashim JCA delivering the judgment of the court:

[1] The defendant was not labouring under any misapprehension with respect to the terms of the settlement which were recorded under the consent judgment. Indeed, the defendant was represented throughout the negotiations, and the draft consent-judgment was explained to the said representative who had then accepted it as correct. The defendant was not misled and it would be against the weight of the evidence to conclude that it had misunderstood the terms of the settlement as embodied in the consent judgment. Consequently, the learned judge had erred in law, as well as on the facts, when he varied the terms of the consent judgment upon the defendant's application to set aside the whole of the consent judgment. (pp 237 h & 238 a-c)

[2] The consent judgment had been drawn up and perfected; it was recorded in the presence of the parties in the course of the trial. (p 238 d)

[3] The learned judge was *functus officio* after having dismissed the defendant's application to set aside the consent judgment. In the circumstances, he would have no jurisdiction to alter or vary the consent judgment thereafter. An order by consent is evidence of the contract between the parties and is binding on all the parties to the order. (p 238 d-g)

[Consent judgment restored.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh plaintif terhadap keputusan yang arif hakim yang meminda penghakiman persetujuan yang dimasuki di antara plaintif dan defendan sebelumnya. Adalah menjadi hujah plaintif bahawa yang arif hakim, setelah menolak permohonan defendan untuk mengetepikan penghakiman persetujuan, tidak seharusnya bertindak lebih lanjut dari itu dan meminda penghakiman persetujuan tersebut. Ini, menurut plaintif, adalah kerana yang arif hakim telah pun *functus officio*, dan oleh itu, tidak berbidang kuasa untuk meminda penghakiman persetujuan. Defendan sebaliknya mengatakan bahawa yang arif hakim masih mempunyai budi bicara untuk meminda selagi penghakiman persetujuan itu belum disempurnakan.

Diputuskan (membenarkan rayuan plaintif)
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

[1] Defendan tidak berada dalam keadaan terkeliru berkaitan dengan terma-terma penyelesaian yang direkodkan dalam penghakiman persetujuan. Malah, disepanjang perundingan, defendan adalah diwakili dan draf penghakiman persetujuan telah ditunjukkan kepada wakil itu yang menerimanya sebagai betul. Defendan tidak dikelirukan dan mengatakan defendan tersalah faham akan terma-terma penyelesaian yang ada dalam penghakiman persetujuan adalah bertentangan dengan keterangan. Oleh itu, yang arif hakim telah khilaf di sisi undang-undang, dan juga fakta, apabila beliau mengubah terma-terma penghakiman persetujuan ekoran permohonan defendan untuk mengetepikan keseluruhan penghakiman persetujuan.

[2] Penghakiman persetujuan telah ditulis dan disempurnakan; ia juga telah direkodkan di hadapan pihak-pihak dalam masa perbicaraan.

[3] Yang arif hakim telah *functus officio* setelah menolak permohonan defendan untuk mengetepikan penghakiman persetujuan. Oleh yang demikian, beliau tidak berbidang kuasa untuk mengubah atau meminda penghakiman

persetujuan kemudian dari itu. Perintah melalui persetujuan bersama adalah suatu kontrak di antara pihak-pihak di mana kesemua mereka adalah terikat dengannya.

Penghakiman persetujuan dipulihkan.]

Case(s) referred to:

Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors [1981] 2 MLJ 145 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 20 r. 11

For the appellant/plaintiff - Raftfizi Zainal Abidin; M/s Aris Rizal Christopher Fernando & Co

For the respondent/defendant - K Anandaraj (Paul Selladurai); M/s Mohamad Jefri, Anandaraj, Paul & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Nik Hashim JCA:

Background

This appeal is against the decision of learned judge of the Seremban High Court given on 29 September 1997 in varying 20 September 1996 consent judgment on the respondent's application to set aside the same.

The appellant's/plaintiff's case against the respondent/defendant is for payment in the sum of RM445,350 for work done by the appellant pursuant to a sub-contract between the appellant and the respondent.

On 18 September 1996 to 19 September 1996, the hearing of this case proceeded before the learned judge with the plaintiff calling three witnesses and the defendant calling one witness to testify. When the case came up for continued hearing on 20 September 1996, it was stood down for settlement by the parties. Assisted by their respective solicitors, the terms of settlement were arrived at between the parties. Consequently the learned judge in the presence of the parties recorded the settlement as follows:

DALAM MAHKAMAH TINGGI MALAYA DI SEREMBAN DALAM NEGERI SEMBILAN DARUL KHUSUS, MALAYSIA

Guaman No. 22-66-1991

Antara

Gai Hin Refrigeration Sdn. Bhd. Plaintif

Dan

Kamanis Holdings Sdn. Bhd. Defendan

Dihadapan Yang Arif
Dato' Mohd Noor Bin Hj. Abdullah
Hakim Mahkamah Tinggi
Seremban

Pada 20hb September 1996 Dalam Mahkamah Terbuka

PERINTAH

GUAMAN INI dipanggil untuk perbicaraan pada 18hb, 19hb dan 20hb September, 1996 dengan kehadiran Encik Christopher Fernando dan Encik Haresh Mahadevan peguam-peguam bagi pihak Plaintif dan Encik Murugappan peguam bagi pihak Defendan dan SETELAH KEBENARAN MAHKAMAH diperolehi untuk memasukkan penghakiman persetujuan terhadap Defendan.

DENGAN PERSETUJUAN KINI DIHAKIMI bahawa Defendan membayar kepada Plaintif sejumlah RM445,350.00 (Ringgit Malaysia Empat Ratus Empat Puluh Lima Ribu dan Tiga Ratus Lima Puluh Sahaja) yang disimpan di dalam Hongkong Bank akaun No. 351-294541-145 termasuk faedah kepada Plaintif;

DAN JUGA DIPERINTAHKAN bahawa faedah yang diperolehi melalui jumlah di atas melalui Hongkong Bank dibayar kepada Lembaga Kemajuan Ikan Malaysia untuk kerja-kerja liabiliti kekurangan berjumlah RM15,986.98 (Ringgit Malaysia Lima Belas Ribu Sembilan Ratus Lapan Puluh Enam Dan Sembilan Puluh Lapan Sahaja).

DAN JUGA DIPERINTAHKAN bahawa faedah sebanyak 8% setahun dibayar dari tarikh pemfailan hingga tarikh penghakiman dan Defendan dikehendaki mendepositkan dalam masa satu bulan dari tarikh perintah ini surat ikatan hakmilik harta benda bersamaan jumlah RM220,000.00 dengan Mahkamah Yang Mulia ini sebagai sekuriti untuk pembayaran faedah dan juga ianya didaftarkan dengan Pejabat Pendaftar Tanah.

DAN JUGA DIPERINTAHKAN bahawa faedah 8% setahun dikenakan ke atas pembayaran faedah di atas dari tarikh penghakiman ke tarikh jumlah ini dijelaskan.

DAN AKHIRNYA DIPERINTAHKAN bahawa Defendan membayar kos yang dipersetujui sebanyak RM25,000.00 (Ringgit Malaysia Dua Puluh Lima Ribu Sahaja) kepada peguam Plaintif dalam masa satu bulan dari tarikh perintah ini.

Bertarikh pada 20 haribulan September, 1996.

t.t
...
TIMBALAN PENDAFTAR
MAHKAMAH TINGGI
SEREMBAN

Perintah ini difailkan oleh Tetuan Aris Rizal Christopher Fernando & Co., peguam bagi pihak Plaintif yang beralamat di No. 49, Tingkat Satu, Jalan Yam Tuan, 70000 Seremban, Negeri Sembilan Darul Khusus. (HM/405).

On 7 October 1996 the respondent filed a summons in chambers at encl. 133 to set aside the above said judgment.

On 29 September 1997 the learned judge, in dismissing the respondent's application with costs, varied and disallowed the interest in 20 September 1996 consent judgment in the following terms:

Pada 29hb September, 1997 Dalam Kamar

PERINTAH

SAMAN DALAM KAMAR lampiran 133 dipanggil untuk pendengaran pada 29hb September, 1997 dengan kehadiran En. Selladurai, peguam bagi pihak Defendan dan En. Haresh Mahadevan, peguam bagi pihak Plaintif dan setelah membaca Saman Dalam Kamar, Afidavit Kalthom bte Jaffar yang diikrarkan pada 7hb Oktober, 1996, Afidavit Fong Weng Wah yang diikrarkan pada 5.12.1996, Afidavit Muhammad bin Hj. Awang yang diikrarkan pada 27hb Mac, 1997 dan Afidavit Fong Weng Wah yang diikrarkan pada 9hb Mac, 1997 serta penghujahan-penghujahan dari kedua-dua pihak MAKA ADALAH DIPERINTAHKAN bahawa permohonan ini ditolak dan DIPERINTAHKAN BAHAWA Perintah yang bertarikh 20hb September, 1996 dipinda dengan hanya setakat **mengenepikan persetujuan mengenai faedah sebanyak 8% setahun dari tarikh pemfailan hingga ke tarikh penghakiman** DAN JUGA DIPERINTAHKAN BAHAWA Defendan dikenakan faedah 8% dari tarikh penghakiman sehingga tarikh penjelasan penuh DAN AKHIRNYA DIPERINTAHKAN BAHAWA lain-lain terma yang dipersetujui di dalam perintah bertarikh 20hb September, 1996 melainkan yang dipinda, dikekalkan.

Bertarikh pada 29hb September, 1997

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...
TIMBALAN PENDAFTAR
MAHKAMAH TINGGI
SEREMBAN

Judge's Decision

In his judgment, the learned judge at pp. 42 and 43 of the appeal record explained the reasons why he varied the consent judgment:

> Mahkamah mendapati penghakiman itu memihak sepenuhnya kepada Plaintif dan Defendan tiada sebab untuk menyetujuinya kerana ia tiada mendatangkan sebarang benefit kepada Defendan. Mahkamah juga mendapati faedah tertentu sebanyak RM15,986.98 tidak dituntut dalam penyata tuntutan dan bagaimana pula Defendan harus menyetujuinya. Begitu juga dengan persetujuan supaya Defendan membekalkan sekuriti berjumlah RM220,000.00. Ini tidak timbul langsung. Oleh yang demikian Mahkamah mendapati Defendan mungkin tidak faham kesan dan akibat penghakiman yang kononnya dipersetujui itu. Mahkamah tidak menerang atau menjelaskan terma penghakiman itu tetapi Mahkamah ada mempastikan sama ada Defendan mencapai persetujuan dengan Plaintif. Persetujuan tentang 2 perkara yang tersebut di atas diragui dan diketepikan.
>
> Selanjutnya Defendan mempertikaikan ada bersetuju membayar faedah dan kos. Selain dari tohmahan Defendan terhadap bekas peguamnya tiada terdapat sebarang keterangan. Disebaliknya pula tidak terdapat penafian dari bekas peguamnya. Tetapi Plaintif ada menerangkan perbincangan yang membawa kepada persetujuan itu. Pada pendapat saya sesuatu penghakiman yang dipersetujui tidak wajar diketepikan dengan tohmahan semata-mata seperti dalam kes ini, kerana jika diterima, sesuatu penghakiman itu tidak akan muktamad dan mudah dipertikaikan.
>
> Oleh kerana itu saya kekalkan penghakiman tentang pembayaran RM445,350.00 berserta faedah dan kos.

Contentions Of Parties

Learned counsel for the appellant submitted that the learned judge had misdirected himself when having correctly dismissed the said summons in chambers varied the consent judgment as he was *functus officio* and had no jurisdiction under the application to vary or set aside the same consent judgment.

Learned counsel for the respondent on the other hand argued that the learned judge had the discretion to amend the consent judgment before it was perfected.

It is to be noted that in the course of the respondent's submission, the respondent withdrew its cross appeal and we ordered it to be struck out with costs.

Decision

We agree with the appellant. The respondent was not under any misapprehension or confusion as to any of the terms agreed upon which were embodied in the consent judgment. The respondent, represented by its director Puan Khaltom bt. Jaffar, was present on 20 September 1996 throughout the negotiations for

settlement and the draft judgment was explained to her by her solicitor and she admitted its correctness. Furthermore, she was present in the learned judge's chambers whereupon the learned judge ascertained with the respondent on the terms that were agreed upon with the plaintiff. Puan Khaltom was not misled. To hold that she misunderstood the terms of the settlement would be against the weight of the evidence adduced by the parties through their affidavits.

Thus, we hold that the learned judge erred in law and in fact in varying the terms of the consent judgment on an application to set aside the whole of the consent judgment on the ground that the terms of the said consent judgment were not to the benefit of the respondent when in actual fact the appellant was entitled to be paid the judgment sum and also entitled to interest as it was prayed for in the statement of claim.

In the present case, the consent judgment dated 20 September 1996 had been drawn up and perfected. It was recorded in the presence of the parties in the course of the trial. In the circumstances, the learned judge having rightly dismissed the respondent's summons in chambers, was *functus officio*, and therefore he could not alter, vary or set aside the judgment as he had no jurisdiction under the application to do so, except under the slip rule as set out in O. 20 r. 11 of the Rules of the High Court 1980 (the RHC). The Federal Court in the case of *Hock Hua Bank Berhad v. Sahari bin Murid* [1981] 1 MLJ 143 ruled:

> (1): the learned judge was *functus officio*;
>
> (2): the court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it had been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing.

It is to be noted that an order by consent is evidence of the contract between the parties and is binding on all the parties to the order (see *Ganapathy Chettiar v. Lum Kum Chum & Ors*; *Meenachi v. Lum Kum Chum & Ors* [1981] 2 MLJ 145 FC). Therefore, the appellant and the respondent in this case are bound by 20 September 1996 consent judgment.

Accordingly, we allowed the appeal with costs and set aside the order of the learned judge dated 29 September 1997. We ordered that the consent judgment recorded on 20 September 1996 be restored. The deposit paid into court was ordered to be refunded to the appellant.